IN THE HIGH COURT OF DELHI AT NEW DELHI
MAT. APP. 42/2005

Judgment delivered on: 28.07.2010

Smt. Shradhanjali Sahoo @ Lina ..... Appellant
Through: Mr. M.R.Mishra, Advocate
Versus
Sh. Surendra Nath Sahoo ..... Respondent
Through: Nemo.

CORAM:
HON'BLE MR. JUSTICE KAILASH GAMBHIR,

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes

2. To be referred to Reporter or not? Yes

3. Whether the judgment should be reported in the Digest? Yes

KAILASH GAMBHIR, J. Oral:
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1 . By this appeal filed under Section 28(1) of the Hindu Marriage Act, 1955 r/w Section 104 and Order 43 Rule 1 of the CPC, the appellant seeks to challenge the order dated 29.03.2005 passed by the Ld. ADJ thereby dismissing the application filed by the appellant under Order 9 rule 13 CPC to seek setting aside of the ex-parte judgment and decree dated 25.09.2003.

2 . Brief facts of the case as stated by the appellant in the appeal are that she derived the knowledge about the pendency of the divorce petition filed by the respondent only before the Ld. Family Judge, Cuttack, Orissa. The appellant states that in the said proceedings pending before the Cuttack Court she was informed by the respondent about the said divorce petition filed by him on 5.9.2002 and also service of the appellant being effected through publication in the newspaper 'Statesman' dated 7.9.2002. After having gained the said knowledge, the appellant could lay her hands on the said newspaper dated 7.9.2002 only on 13.09.2002. It is further stated that due to the paucity of time and the fact that the appellant was staying at a distance of about 2000 kilometres from Delhi with her small daughter, she was not in a position to appear before the concerned court at Delhi in the divorce proceedings. The appellant also states that she sent a letter dated 16.09.2002 to the Ld. Additional District Judge *inter alia* praying for the payment of Rs.5000/- towards litigation expenses to contest the case in Delhi. The father of the appellant also wrote a separate letter to the Ld.

AdJ informing the judge about the decision of the appellant to file a transfer petition before the Hon'ble Supreme Court of India. She further states that the appellant sent a letter of request to the Hon'ble Chief Justice of India dated 7.10.2002 for the transfer of the HMA case No. 888 of 2001 pending in the Tis Hazari Courts to the Family Court, Cuttack, Orissa. The appellant received a letter dated 15.11.2002 from the Assistant Registrar, Supreme Court, New Delhi intimating the appellant that no action could be taken on the request made by the appellant as it was in contravention of Order X R.5, 6 (1) of the Supreme Court Rules, 1966. Thereafter, the Appellant on 27.01.2003 made an appeal to the Supreme Court Legal Services Committee seeking legal aid for transfer of divorce proceedings pending in Delhi to Cuttack, Orissa. The appellant further states that on 3.2.2004, she learnt from the Supreme Court Legal Services Committee regarding order dated 19.01.2004 passed by the Hon'ble Supreme Court in the said transfer petition bearing No. Transfer Petition (C) No. 6/2004 moved by the appellant and the grant of stay of the said divorce case pending before the

Additional District Judge. She also states that she received another letter dated 27.04.2004 on 5.5.2004 along with a copy of order dt. 12.04.2004 wherefrom she learned that the transfer petition filed by her was disposed of as having become infructuous as the case sought to be transferred was finally decided by the ld. ADJ on 25.09.2003. The appellant thus states that she came to know about the ex-parte decree of divorce dated 25.09.2003 passed in favour of the respondent only from the W.S. filed by the respondent in the maintenance suit No. 59/2002 on 29.06.2004 pending before the Family Court at Cuttack, Orissa. The appellant also states that she was a distressed woman having no source of income with a two year old child and was not in a position to contest the proceedings before the Delhi Courts. After having come to know about the said ex–parte decree the appellant immediately took steps to move an application under Order 9 rule 13 CPC to set aside the ex-parte decree of divorce but the said application of the appellant was dismissed by the Ld. Trial Court vide order dated 29.03.2005.

Assailing the said order, the appellant has preferred the present appeal before this court.

3 . Challenging the said order, counsel for the appellant submits that the Ld. Trial Court has ignored the fact that the appellant was a distressed woman with no financial source and was not in a position to appear before the said court at Delhi, more particularly, when the appellant was also having a small child of two years. Counsel further submits that the appellant came to know about the filing of the said case by her husband only in the maintenance proceedings at Cuttack when she was told about the filing of the divorce petition by him and her service through publication in the newspaper 'Statesman'. The contention of the counsel for the appellant is that the appellant was never given any copy of the divorce petition and in the absence of the same, the appellant was not in a position to contest the divorce case. Counsel also submits that the ld. Trial Court has not appreciated the fact that the appellant could not have appeared before the said court due to insufficiency of time for her appearance before the court. In support of his

argument, counsel for the appellant has referred to Order 9 Rule 6 (c) CPC. Counsel for the appellant further submits that the Ld. Trial Court has wrongly observed in the impugned order that the father of the appellant had presented the application in the court himself. Counsel submits that the fact of the matter is that the said application was sent by the father of the appellant as well as by the appellant by post. Counsel further submits that the appellant had never appeared before the Supreme Court also and the transfer petition was filed by the Legal Aid Committee of the Supreme Court on the request sent by the appellant by post. Counsel thus submits that the non-appearance of the appellant before the said court was neither intentional nor deliberate but was due to the aforesaid bonafides.

4. I have heard learned counsel for the appellant and given my thoughtful consideration to the pleas advanced by him.

5 . The respondent has not preferred to contest the present appeal.

6 . The marriage between the appellant and respondent was solemnized on 29.11.1999 and on 13.10.2000 she gave birth to a girl child. Thereafter, the respondent filed a petition for divorce and an ex-parte decree of divorce was passed by the learned Additional District Judge against the appellant vide judgment and decree dated 25.9.2003, thereby dissolving the marriage of the appellant with the respondent under Section 13(1) (ia) of the Hindu Marriage Act. After having learnt about the said judgment and decree of divorce the appellant vide her application dated 10.9.2004 filed under Order 9 Rule 13 CPC sought setting aside of the said ex-parte decree of divorce. The appellant in her said application pleaded knowledge of the institution of the said divorce petition by her husband on 5.9.2002, when the same was disclosed to her by her husband in the case filed by the appellant for grant of maintenance (Suit No. 59/2002) before the Family Court, Cuttack, Orissa. The appellant has further taken a stand that the appellant was

not disclosed the exact details of the divorce petition filed by the respondent and it is only on 13.9.2002 the appellant could lay her hands on the notice published in the newspaper 'Statesman' dated 7.9.2002. The appellant has further stated that it was impossible on her part to have appeared before the trial court from a distance of more than 2000 kilometres from Delhi. The appellant has further stated that the application dated 16.9.2002 was sent by the appellant through post directly to the Court of the ADJ with a request to award litigation expenses for a sum of Rs.5,000/-. The appellant also made an appeal in writing to the Hon'ble Chief Justice of India through postal request dated 7.10.2002 for transfer of the pending HMA case from the court at Delhi to Cuttack, Orissa. The appellant has also taken a stand that the Hon'ble Supreme Court had granted stay of the said HMA suit No. 888/2001 in the said transfer petition filed by the appellant but ultimately the said transfer petition was disposed of on account of the fact that in the meanwhile, the learned ADJ had granted ex-parte decree of divorce dated 25.9.2003.

7. It is not in dispute that the appellant was served through publication in the newspaper 'Statesman' dated 7.9.2002 for her appearance in the court on 13.9.2002. It is further not in dispute that the appellant had come to know of the said notice but certainly could not have appeared before the court on the same date when she could lay her hands on the said notice. Instead of causing appearance before the trial court the appellant chose to write a letter to the said concerned court in Delhi claiming some litigation expenses and in the meanwhile, the appellant through another postal communication addressed to the Supreme Court sought transfer of the said divorce petition to the Family Court, Cuttack, Orissa. The learned trial court accepted due service of the appellant at least when she was served through publication. The Court also took into consideration the fact that the father of the appellant had appeared in the said divorce petition when he had informed the court about filing of an application before the Supreme Court seeking transfer of the said divorce petition. The court thus felt that the appellant did not take any steps to seek setting aside of

the ex-parte decree within the period of 30 days as prescribed in Schedule III of the Limitation Act. The trial court also observed that even if the knowledge of the appellant is counted from 29.6.2004, the alleged date when she came to know about the said ex-parte decree being passed against her, even then the application was not moved by the appellant within the stipulated time. The main reason which weighed with the learned trial court was that when the father of the appellant could appear before the trial court to apprise the court about their move to seek transfer of the petition then why the appellant could not have caused appearance before the trial court to contest the said divorce petition.

8 . Counsel for the appellant has raised serious dispute with regard to the finding of the learned trial court to hold that the father of the appellant had appeared and had moved an application to apprise the court about the filing of a transfer petition before the Hon'ble Supreme Court. The contention of the counsel for the appellant was that in fact the father of the appellant had never appeared and even his

attendance was never recorded by the court on 30.9.2002, but the learned trial court wrongly assumed the presence of the father of the appellant on 30.9.2002. This contention of the counsel for the appellant appears to be correct. Perusal of the order dated 30.9.2002 clearly shows that only the respondent was present along with his counsel and the presence of the father of the appellant has not been recorded. There is a letter dated 27.09.2002 filed on record by the father of the appellant and it appears that the said letter was received by the court through post and the same was directed to be placed on 30.09.2002 when the main matter was fixed before the court. The said letter had wrongly been taken as an application by the learned trial court. The learned trial court also wrongly assumed as if the father of the appellant had appeared before the matrimonial court. It can also be found from the record that earlier the appellant herself had written a letter to the court claiming grant of litigation expenses. Even before the Supreme Court the transfer petition was filed by the appellant with the help of Supreme Court Legal Services

Committee and at no stage the appellant or her father had appeared before the Supreme Court. So far the service of the appellant through publication is concerned, the notice was published in the newspaper 'Statesman' dated 7.9.2002 for the next date fixed in the court i.e. 13.9.2002. As per the case of the appellant she could lay her hands on the said notice only on 13.9.2002 and therefore it was not possible for the appellant to have caused appearance before the said court on that very date.

9. The appellant who has been a resident of Cuttack, Orissa which is a far off place and with a child of 2 years under her parent's custody, had made a request through a letter for grant of litigation expenses for an amount Rs. 5,000/- and it could have been better if the Court would have given directions to the respondent to send the said amount to her so as to enable her to travel to Delhi for contesting the said divorce petition. Finding no other option, the appellant had sent a letter to the registry of the Supreme Court which letter was sent by the registry to the Supreme Court Legal Services Committee and based on the

said letter a transfer petition was filed on behalf of the appellant to seek transfer of the said divorce petition to Cuttack, Orissa, but before any effective order could be passed by the Supreme Court the matrimonial court granted ex-parte decree of divorce.

10. Taking into consideration the aforesaid totality of the circumstances, this court is of the view that the appellant has given sufficient explanation for her non-appearance before the said matrimonial court and accordingly the ex-parte divorce judgment and decree dated 25.9.2003 is hereby set aside.

11. The appellant is accordingly directed to appear before the learned trial court on ---- and take necessary steps in the matter.

July 28, 2010 **KAILASH GAMBHIR,J**